91-1226

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ALABAMA,

PETITIONER - APPELLEE,

V.

O. P. HOLLIS,

RESPONDENT - APPELLANT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
[28 U.S.C. §2254 PROCEEDINGS]

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Eleventh Circuit misapplied this Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), by holding that in a claim of ineffectiveness of counsel where a convicted defendant proved that his counsel committed unreasonable error by failing to object, during his 1959 trial, to the unconstitutional exclusion of blacks from the selection of the grand and petit juries, the court could presume prejudice and grant the habeas relief because neither party could produce a transcript of the trial proceedings nor offer any other evidence on the question of prejudice?

2. Did the Court of Appeals for the Eleventh Circuit violate this Court's decision in Norvell v. Illinois, 373 U.S. 420, when it held that, under Rule 9(A), Rules Governing §2254 Cases, the convicted defendant would not be held responsible for

the State's inability to respond to the merits of an ineffective assistance of counsel claim due to the unavailability of a trial transcript even though the unavailability was directly due to his delay of over twenty-one years in bringing the petition during which time the State lost the ability to prepare a transcript or otherwise reconstruct the evidence against him?

PARTIES

The caption contains the names of all the parties to the proceedings in the court below.

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OPINIONS BELOW

1. The original opinion of the United States Circuit Court of Appeals for the Eleventh Circuit granting habeas relief is reported at 912 F.2d 1343 (11th Cir. 1990).

The opinion of the Eleventh Circuit on Petition for Rehearing is reported at 941 F.2d 1471 (11th Cir. 1991).

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit which is sought to be reviewed was rendered on September 18, 1991. This Court has jurisdiction under 28 U.S.C. §1254(1), as amended (by Public law 100-352) on June 27, 1988.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI (in pertinent part)

...; In all criminal proceedings, the accused shall ... have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

The convicted defendant, O. P. Hollis, was indicted by the Grand Jury of Bullock County, Alabama for the crime of burglary in the first degree. Trial of his case began on March 25, 1959, and afterwards, a verdict of guilty was returned. The defendant was sentenced to ninety-nine (99) years upon the determination of the jury. The defendant did not appeal the conviction.

Petitioner filed the instant petition for federal habeas relief on January 8, 1987. On June 15, 1988, Magistrate Judge John Carroll of the United States District Court for the Middle District of Alabama recommended that the defendant's petition for habeas relief be denied. That Recommendation was adopted by the District Court on July 14, 1988.

On September 25, 1990, the United States Court of Appeals for the Eleventh Circuit reversed the district court and granted habeas relief on the ground that the

defendant had proved that his trial counsel had been ineffective for failure to object to the systematic and unconstitutional exclusion of blacks from his grand and petit juries. The Eleventh Circuit affirmed its initial granting of the writ on rehearing on September 18, 1991.

STATEMENT OF THE FACTS

The defendant, an illiterate black man, was convicted in 1959 of burglary in the first degree. The defendant allegedly entered the home of a white victim and severely beat him with a weapon. Since no appeal was taken from the conviction, the actual facts of the trial have not been preserved for review.

The defendant alleged that he filed state court petitions in 1961 and 1966 and alleged that he never received a hearing on the petitions nor counsel to represent him.

The defendant was paroled on March 16, 1970 and that parole was revoked on September 19, 1971. He was paroled again on May 7, 1973

and that parole was revoked on April 24, 1974. Again he was paroled on May 16, 1977 and again it was revoked on June 14, 1978.

The defendant filed his first federal habeas petition in 1981 and the petition was dismissed for failure to exhaust State remedies. The defendant did not file any petition in state court but returned to federal court and filed a petition in 1984 which was also dismissed for lack of exhaustion.

In 1984, the defendant filed a petition for error coram nobis relief in the Circuit Court of Bullock County, Alabama and this petition was not ruled upon because it was "not in proper order".

Petitioner then returned to federal court and filed the instant petition on January 8, 1987. Finding that the defendant was illiterate and that, because there was no guarantee that counsel would be appointed to assist the defendant to pursue his claim in state court, the Magistrate Judge decided that

it would be futile to order the defendant to refile his state petition and decided to proceed in federal habeas corpus.

In a nutshell, the defendant claimed that his 1959 conviction was invalid because it was obtained through the systematic exclusion of blacks from the grand and petit juries in violation of Strauder v. West Virginia, 100 U.S. 303 (1880) and of Norris v. Alabama, 294 U.S. 587 (1935). In defense, the State of Alabama asserted that this claim was procedurally defaulted, pursuant to Wainwright v. Sykes, 433 U.S. 72 (1977), because Hollis did not object to the striking at trial nor appealed his conviction to the state appellate courts.

Hollis then claimed that his attorney was ineffective for failing to object and to appeal, and that the ineffective assistance of counsel was excuse for the procedural default under Murray v. Carrier, 477 U.S. 478 (1986).

The State's counter claim that, under Rule 9(A), Rules Governing §2254 Cases, the ineffective assistance claim could not be used to excuse the procedural default because Hollis' delay in bringing the claim had prejudiced the State's ability to respond to the merits of the ineffective assistance claim, especially the prejudice prong, was accepted by the Magistrate and the District Court mainly on the theory that the defendant's failure to appeal the conviction precluded the State from preparing a transcription of the trial proceedings, that all of the material witnesses against the defendant were deceased and that the lack of a transcript or witnesses precluded the State from defending the conviction by showing that the evidence against the defendant was of such strength that he would have been convicted even with a mixed- race jury. The Magistrate and the District Court denied the ineffective claim under Rule 9(A). Furthermore, the defendant had presented no evidence on the

prejudice in the District Court proceedings. The Eleventh Circuit adopted the District Court's finding that there had been no actual prejudice resulting from the unconstitutional selection of the grand jury, but reversed the District Court on the ground that Hollis had been prejudiced by the trial before an all white, unconstitutionally selected petit jury.

REASON FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE ELEVENTH CIRCUIT'S HOLDING THAT A COURT CAN PRESUME THAT AN UNREASONABLE ATTORNEY ERROR RESULTED IN SUFFICIENT PREJUDICE TO THE DEFENSE IN ORDER TO UNDERMINE THE CONFIDENCE IN THE OUTCOME OF THE PROCEEDINGS IN INSTANCES WHERE NEITHER PARTY CAN PRODUCE A TRANSCRIPT OF THE TRIAL PROCEEDINGS NOT OFFER ANY OTHER EVIDENCE ON THE QUESTION OF WHETHER THE DEFENDANT SUFFERED ACTUAL PREJUDICE BECAUSE OF THE ATTORNEY ERROR.

The basic issue presented in this case is whether a federal habeas corpus court which finds that defense counsel committed an

unreasonable professional error, can ever presume that the error resulted in the type of prejudice necessary to grant the habeas relief in cases where the convicted defendant is unable to make an affirmative showing of prejudice. A corollary, but equally important question, is whether a convicted defendant is entitled to a presumption of error in an effective assistance of counsel case merely because of the type of error allegedly committed by defense counsel?

In the landmark case of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the court clearly and expressly stated a two-fold burden that a convicted defendant must overcome if he is to obtain federal habeas relief on the claim that his conviction is invalid because it was obtained as a result of ineffective assistance of counsel:

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence

> has two components. First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

80 L.Ed. at 693.

Under this Court's ruling in Strickland, even if the convicted defendant succeeds in proving that his attorney committed an unreasonable professional error during the representation, he is still not entitled to habeas relief unless he further shows that the unreasonable professional error was prejudicial to the defense. The test for proving the type of prejudice necessary to obtain habeas relief was clearly stated in

Strickland:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

80 L.Ed. at 698.

Furthermore, under this Court's decision in Strickland, the defendant is charged with the burden of proving, through affirmative evidence, that the unreasonable attorney error affected the outcome of his trial:

> "Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.

Strickland, at 80 L.Ed.2d 697.

The Eleventh Circuit decision violates the clear language of Strickland which requires that a convicted defendant affirmatively prove that the attorney error prejudiced the defense. The only way the

Eleventh Circuit could reach the result it did reach in this case was to presume prejudice because the defendant produced no evidence of prejudice at his federal evidentiary hearing.

The error in the Eleventh Circuit's decision is that it relied upon a presumption of prejudice in order to grant the petition. This presumption is apparent in the court's admission that the lack of a trial transcript made it impossible to determine if the attorney error was harmful and admitted that it is conceivable that the transcript could have shown a case of such strength that it would have been improbable that even a constitutionally selected jury would have acquitted. However, the Eleventh Circuit then stated that it would not "assume that the transcript would have demonstrated a case of that strength".

This holding by the Eleventh Circuit conflicts violently with this Court's decision in Strickland which implicitly requires a habeas court to make assumption that the

attorney error did not result in prejudice to the defense because Strickland places a burden on the convicted defendant to affirmatively prove prejudice in order to establish his right to habeas relief:

> "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

Strickland, at 80 L.Ed.2d 693.

> "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . . . Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."

Strickland at 80 L.Ed.2d 696.

In addition, Strickland explicitly rejected a presumption of prejudice in ineffective assistance claims even though such presumptions existed in certain other Sixth Amendment contexts. Instead, the court explicitly required defendants seeking relief under Strickland to affirmatively prove

prejudice. Id at 80 L.Ed.2d 697. Because a habeas court is prohibited from presuming prejudice on behalf of a convicted defendant, then, by deductive logic, a habeas court has to assume, for Strickland purposes, that the outcome of the trial was reliable despite the attorney error.

As a corollary issue, this Court should reverse the Eleventh Circuit's decision because it carves out an exception to the Strickland requirement of prejudice for convicted defendants who seek relief on the ground that their attorney was ineffective for failing to object to the unconstitutional discrimination in the selection of their grand and petit juries. Under the Eleventh Circuit's decision, a showing that counsel failed to object to the unconstitutional selection of jurors based on race is sufficient grounds, by itself, to conclude that the outcome of a black defendant's trial is unreliable, regardless of the strength of the evidence against him. This erroneous

decision was reached by misapplying that court's decision in Huffman v. Wainwright, 651 F.2d 347 (5th Cir. Unit B, July, 1981). Although Huffman indicated that the deprivation of a chance to be tried by a mixed-race jury might by itself meet the prejudice requirement, it also held that the court must "examine the evidence to see whether it might defeat the claim of prejudice", Id at 350. Thus, Huffman, like Strickland, required a showing that the constitutional error harmed the convicted defendant's defense before any habeas relief can be granted.

The Eleventh Circuit's reliance upon a claim that the defendant suffered prejudice because a mixed-race jury might have returned a lesser sentence also relies upon a presumption. In absence of facts showing the strength of the State's case against the defendant, it is impossible for the court to determine that a properly drawn jury would not have returned the same 99 year sentence.

The State of Alabama requests that this Court act to correct the twin errors committed by the Eleventh Circuit's decision. This Eleventh Circuit's decision which allows a presumption of prejudice in the absence of affirmative proof of prejudice will profoundly affect the future application of Strickland in this circuit and all other circuits that may adopt the erroneous reasoning of this Court.

II.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE IF A CONVICTED DEFENDANT SHOULD BE HELD RESPONSIBLE FOR THE STATE'S INABILITY TO RESPOND TO THE PREJUDICE PRONG OF HIS INEFFECTIVE ASSISTANCE CLAIM WHERE HE FAILS TO APPEAL THE CONVICTION WHICH PRECLUDES THE STATE FROM PREPARING AN APPELLATE TRANSCRIPT AND THEN DELAYS IN BRINGING HIS PETITION UNTIL THE STATE HAS LOST THE ABILITY TO PREPARE A TRANSCRIPT AND/OR RECONSTRUCT THE TRIAL EVIDENCE AGAINST HIM.

The basic problem presented by this issue is that the lack of a trial transcript prevented the State from presenting evidence that could have defeated any claim of

prejudice resulting from trial counsel's failure to object to the systematic exclusion of blacks from the defendant's grand and petit juries. Although the District Court, under Rule 9(A), Rules Governing §2254 Cases, found that the State was particularly prejudiced by the unavailability of the transcript, that the defendant should have known of his claims in 1959 and that the convicted defendant's delay contributed to the prejudice because a transcript could have been ordered prepared if the federal petition had been brought while the state records were available, the Eleventh Circuit reversed the District Court, apparently on the ground that the defendant's testimony, which was not contradicted, that he had filed motions seeking a transcript in 1964 and that he had filed state collateral petitions in 1966 and 1972 that were never answered by the State was sufficient to rebut the State's claim that the defendant had unreasonably delayed in bringing his claims to either state or federal court.

The Eleventh Circuit's opinion misapplies 9(A) because it does not accurately reflect the State's 9(A) claim; the State asserted that it was entitled to a Rule 9(A) judgment on the ground that since the Bullock County Circuit Clerk's Office had no record of any petitions being filed, it could not respond either to the convicted defendant's claim that he had filed the petitions, nor to the convicted defendant's claim that he had raised in those petitions the exact claims he is now raising in the instant federal habeas petition, nor to the merits of the ineffective assistance claim, especially the prejudice prong of Strickland. The defendant did not, in support of his allegations, produce any documentary proof that he had filed the petitions.

The State clearly met its burden of prejudice to be entitled to the dismissal order under Rule 9(A) as required by Davis v. Dugger, 829 F.2d 1513 (11th Cir. 1987); Hill v. Lanahan, 697 F.2d 1032 (11th Cir. 1983).

However, the Eleventh Circuit misapplied Rule 9(A) by holding that the convicted defendant would not be held responsible for the State's inability to respond to the prejudice claim because of the unavailability of the transcript.

The Eleventh Circuit's ruling denying Rule 9(A) relief to the State conflicts with the reasoning of this Court's holding in Norvell v. Illinois, 373 U.S. 420, 83 S.Ct. 1366, 10 L.Ed.2d 456 (1963). In Norvell, the court held that where a trial transcript is unavailable due to the death of the court reporter, a defendant may be denied appellate review if the convicted defendant had an attorney at trial and where the unavailability of the transcript was due to no fault of the State. While Norvell involves a construction of right to have a transcript on direct appeal of a conviction under Griffin v. Illinois, 351 U.S. 12, Norvell reasoning is equally applicable and should be applied to federal habeas cases where the unavailability of the

transcript is due to the fault of the convicted defendant. This Court should consider extending the rule in Norvell to instances involving Rule 9(A) cases.

Furthermore, the Eleventh Circuit's ruling in the instant case conflicts with rulings by other circuits that hold that the unavailability of a transcript affects the State's ability to rebut ineffective assistance claims and is therefore prejudicial to the State. Mayola v. State of Alabama, 623 F.2d 998 (5th Cir. 1980), cert. denied, 451 U.S. 913 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979).

CONCLUSION

This Court should grant certiorari and correct the Eleventh Circuit's erroneous application of Strickland and its implicit, though erroneous, holding that claims involving racial discrimination in the selection of grand and petit juries are not subject to the prejudice requirement.

Furthermore, the court should grant certiorari and reverse the erroneous Rule 9(A) ruling of the Eleventh Circuit. The court can take this opportunity to clarify to the lower federal courts that in federal habeas claims which involve very old convictions, the availability of a trial transcript is an important factor in determining whether a State can defend against any claim of prejudice and that the convicted defendant's failure to bring his claim within a reasonable period of time when state records are available must be weighed heavily against his right to have his claims heard in federal habeas proceedings.

Respectfully submitted,

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